Lim Cheang Hock & Anor v Tneh Poay Lan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–1049 OF 2001
GOPAL SRI RAM, ZALEHA ZAHARI AND HELILIAH JJCA
12 SEPTEMBER 2006

Landlord and Tenant — Controlled premises — Subletting — Whether particular relationship licensee or tenant — Whether nemo dat rule applicable here — Doctrine of tenancy by estoppel — Control of Rent (Repeal) Act 1997 s 6(1)

Choong Lye Hock Estate Sdn Bhd (the first defendant in the court below but not at the appellate stage) was the landlord of certain premises of which the plaintiff was the tenant. The tenancy agreement between the plaintiff and his landlord prevented a subletting of the premises in question. On 1 November 1995, the plaintiff entered into an agreement with the second defendant/second appellant. The second defendant had sublet the premises in question to his brother, the third defendant. At the material time, the premises in question were subject to the provisions of the Control of Rent Act 1966 which was repealed by the Control of Rent (Repeal) Act 1997. On 21 May 1998, the plaintiff took out a summons seeking the declarations that the plaintiff was the tenant of the premises, inter alia, pursuant to s 6, Control of Rent (Repeal) Act 1997; and that the second defendant was the licensee of the plaintiff pursuant to an agreement dated 1 November 1995 and was entitled to temporary possession of the premises. These declarations were important to the plaintiff because if he was right then he would be the only person who will obtain the benefit of s 6(1) of the Control of Rent (Repeal) Act 1997. If, of course, he was not the person in occupation then s 6(1) would not apply to him. The learned judge found for the plaintiff. The main issue was whether the second and third defendants were licensees of the plaintiff. The plaintiff submitted that the second defendant could not be more than a mere licensee because the sub tenancy, if any, in the second defendant's favour was created in breach of the covenant against subletting contained in the agreement between him and the first defendant's landlord. As against the third defendant, the plaintiff submitted that because of the second defendant's breach of the covenant against subletting, the third defendant was a mere licensee.

Held, allowing the appeal:

(1) It appeared to be settled by the authorities that whether a particular relationship was that of licensee or tenant depended upon whether the person in occupation had exclusive possession of the subject property (see *Pong Khee Kwei v Tan Sai Kuy* [1972] 2 MLJ 4). It was plain on reading of the agreement of 1 November 1995 as a whole that the second defendant had exclusive possession of the premises in question. For example, cl 4 ensures quiet possession in the second defendant's favour. This pointed strongly to the

relationship between the parties being one of landlord and tenant rather than licensor and licensee (see para 9); *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 followed.

(2) The nemo dat rule, that a person cannot grant what he has not got, was applied in effect in *Hock Yew Co v Fraser & Neave (M) Ltd & Ors* [1965] 2 MLJ 248. However, in *Methani v Perianayagam* [1961] MLJ 5, Wee Chong Jin J dealt with the same argument. The relationship of landlord and tenant was purely an English common law notion. The common law has however grafted an exception, namely, the doctrine of tenancy by estoppel. The doctrine was that a tenant may not question his landlord's title and, conversely, that a landlord had by his offer of a tenancy induced a tenant to enter into (or remain in) occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title to create it. It was entirely unlikely, that *Hock Yew* would have been decided in the way it was if it had considered the views of Wee Chong Jin J (see para 17).

(3) Since the plaintiff on the evidence, had knowledge of the third defendant's presence on the premises and of his occupation and received rentals from him, it now no longer lies in his mouth to assert a breach of the covenant against subletting (see para 27); *Yap Choo Neo (W) v Cheng Lan Lim* [1952] MLJ 160 followed.

[Bahasa Malaysia summary

Choong Lye Hock Estate Sdn Bhd (defendan pertama di mahkamah bawahan tetapi bukan di peringkat rayuan) adalah tuanpunya premis-premis tertentu di mana plaintif adalah penyewa. Perjanjian penyewaan di antara plaintif dan tuantanah tersebut tidak membenarkan penyewaan kecil premis-premis tersebut. Pada 1 November 1995 plaintif memasuki satu perjanjian dengan defendan kedua/perayu kedua. Defendan kedua menyewa semula premis tersebut kepada abangnya, defendan ketiga. Pada masa yang material, premis-premis tersebut tertakluk kepada peruntukan-peruntukan Akta Kawalan Sewa 1966 yang telah dimansuhkan oleh Akta Kawalan Sewa (Pemansuhan) 1997. Pada 21 Mei 1998, plaintif mengeluarkan satu saman menuntut satu deklarasi bahawa plaintif adalah penyewa premis tersebut, antara lain, menurut s 6 Akta Kawalan Sewa (Pemansuhan) 1997; dan bahawa defendan kedua adalah pemegang lesen plaintif mengikut satu perjanjian bertarikh 1 November 1995 dan berhak kepada satu milikan sementara premis-premis tersebut. Deklarasi ini adalah penting kepada plaintif oleh kerana sekiranya beliau betul maka beliaulah seorang sahaja yang akan memperolehi faedah s 6(1) Akta Kawalan Sewa (Pemansuhan) 1997. Sekiranya, beliau bukan orang yang mendiami maka s 6(1) tidak akan terpakai kepadanya. Hakim yang bijaksana memihak kepada plaintif. Isu utama ialah sama ada defendan kedua dan ketiga adalah pemegang lesen plaintif. Plaintif menghujahkan bahawa defendan kedua tidak melebihi pemegang lesen disebabkan penyewaan kecil, sekiranya ada, di bawah defendan kedua telah menghasilkan satu kemungkiran perjanjian terhadap penyewaan kecil yang terkandung di dalam perjanjian di antara beliau dan defendan pertama, tuantanah. Terhadap defendan ketiga, plaintif menghujahkan bahawa

disebabkan kemungkiran perjanjian defendan kedua terhadap penyewaan kecil, defendan ketiga adalah hanya pemegang lesen.

Diputuskan, membenarkan rayuan tersebut:

(1) Ia nampaknya adalah telah ditetapkan oleh autoriti-autoriti bahawa sama ada sesuatu perhubungan adalah pemegang lesen ataupun penyewa bergantung kepada sama ada orang yang mendiami mempunyai milikan eksklusif ke atas hartanah tersebut (lihat *Pong Khee Kwei v Tan Sai Kuy* [1972] 2 MLJ 4). Adalah jelas daripada membaca perjanjian bertarikh 1 November 1995 secara keseluruhan defendan kedua mempunyai milikan eksklusif ke atas premis tersebut. Contohnya, kl 4 menjamin milikan aman di pihak defendan kedua. Ini jelas menunjukkan bahawa perhubungan di antara pihak-pihak adalah tuantanah dan penyewa dan bukan pemberi dan pemegang lesen (lihat perenggan 9); *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 diikut.

(2) Peraturan nemo dat, bahawa seseorang tidak boleh memberikan apa yang beliau tidak mempunyai, dipakai di dalam kes *Hock Yew Co v Fraser & Neave (M) Ltd & Ors* [1965] 2 MLJ 248. Akan tetapi, dalam *Methani v Perinayagam* [1961] MLJ 5, Wee Chong Jin J telah meneliti hujahan yang sama. Perhubungan tuantanah dan penyewa adalah satu common law Inggeris. Akan tetapi terdapat pengecualian dalam common law, iaitu, doktrin penyewaan melalui estopel. Doktrin ini adalah bahawa seseorang penyewa tidak boleh mempersoalkan hakmilik tuantanah dan, juga, seseorang tuantanah yang telah menawar penyewaan yang menyebabkan seseorang penyewa memasuki (atau tetap) menduduki dan membayar sewa, tidak boleh menafikan keesahan penyewaan tersebut dengan mempertikaikan pembetukkan hakmilik sendirinya. Adalah tidak berkemungkinan, bahawa Hock Yew diputuskan seperti yang telah diputuskan sekiranya ia mempertimbangkan pendapat Wee Chong Jin J tersebut (lihat perenggan 18).

(3) Oleh kerana berdasarkan bukti, plaintif mempunyai pengetahuan bahawa kehadiran defendan ketiga dipremis tersebut dan mendudukinya dan juga menerima sewaan daripadanya, ia kini tidak lagi terbuka untuknya untuk menyatakan bahawa terdapat satu kemungkiran perjanjian terhadap penyewaan kecil (lihat perenggan 27); *Yap Choo Neo (W) v Cheng Lan Lim* [1952] MLJ 160 diikut.]

Notes

For cases on subletting, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 793–798.

Cases referred to

Addiscombe Garden Estate Ltd v Crabbe [1958] 1 QBD 513 (refd)
Antoniades v Villiers [1988] 3 AII ER 1058 (refd)
Goh Gok Hoon v Abdul Hamid & Anor [1967] 1 MLJ 36 (refd)
Great Eastern Life Assurance v Goh Ah Kow T/A Singapore Dry Cleaners & Anor [1981] 1 MLJ 127 (refd)
Hock Yew Co v Fraser & Neave (M) Ltd & Ors [1965] 2 MLJ 248 (not folld)
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85 (folld)

A *Methani v Perianayagam* [1961] MLJ 5 (refd)
Natesan v Goh Gok Hoon [1968] 2 MLJ 3
Pong Khee Kwei v Tan Sai Kuy [1972] 2 MLJ 48 (folld)
Street v Mountford [1958] 2 AII ER 289 (refd)
Yap Choo Neo (W) v Cheng Lan Lim [1952] MLJ 160 (refd)

B **Legislation referred to**
Control of Rent Act 1966
Control of Rent (Repeal) Act 1997 ss 3, 6

C **Appeal from**: Originating Summons No 24–455 of 1998 (High Court, Pulau Pinang)

Lee Khai (Ong & Manecksha) for the appellants.
Sunny Khoo (Ismail Khoo & Assoc) for the respondent.

D **Gopal Sri Ram JCA (delivering judgment of the court):**

[1] This is the judgment of the court.

E **[2]** This appeal is directed against the order of the High Court dated 24 October 2001. By that order the High Court granted the declarations sought by the plaintiff (respondent before us). Those declarations were in the following terms:

(1) that the plaintiff is the tenant of premises No 150 and 152, Jalan Macalister, Pulau Pinang owned by the first defendant, inter alia, pursuant to s 6 of the
F Control of Rent (Repeal) Act 1997;

(2) that the second defendant is the licensee of the plaintiff pursuant to an agreement dated 1 November 1995 and is entitled to temporary possession of No 150 and 152, Jalan Macalister, Pulau Pinang latest until 2 August 1998.

G **[3]** The factual matrix against which these declarations were granted is as follows. Choong Lye Hock Estate Sdn Bhd (the first defendant in the court below but who is not before us) is the landlord of certain premises of which the plaintiff is the tenant. The tenancy agreement between the plaintiff and his landlord prevents a subletting of the premises in question. On 1 November 1995, the plaintiff entered into an
H agreement with the second defendant (second appellant before us). It is an important document. In fact everything turns upon it. It is therefore necessary to set it out in extenso. This is what it states:

> This Agreement is made the 1st day of November 1995 between TNEH POAY LAN (NRIC NO 1837486) of No. 150, Macalister Road, Penang (hereinafter referred to as
I 'the Lessor') of the one part AND LIM CHEANG HOCK (NRIC NO. 4269223) of No. MKV 59, Kuala Sg. Pinang, Balik Pulau, Penang (hereinafter referred to as 'the Lessee') of the other part.
>
> WHEREAS the Lessor is the registered proprietor of the coffee shop business known as CHOP YEE LOO of No. 150-152, Macalister Road, Penang (hereinafter referred to as 'the said Business').

WHEREAS the Lessor is carrying on the said business on the ground Floor of No. 150-152, Macalister Road, Penang (hereinafter called 'the said Premises'). A

AND WHEREAS the Lessor agrees to let and the Lessee agrees to take the said business at the said premises upon the terms and conditions hereinafter appearing.

WHEREBY IT IS AGREED as follows:

B

(1) The Lessor shall hereby let and the Lessee shall hereby take over the said business of the said CHOP YEE LOO of No. 150-152, Macalister Road, Penang and deemed to have commenced for the term as from 3rd day of August, 1995 to the 2nd day of August, 1998 (hereinafter referred to as 'the said Lease') PAYING THEREFORE a rental of Ringgit Malaysia Three Thousand Six Hundred Only (RM3,600) per month which is payable within the first two weeks of each calendar month.

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(2) The Lessee shall on the execution of this Agreement pay to the Lessor the sum of Ringgit Malaysia Twenty Five Thousand Only (RM25,000) being deposit of rent (hereinafter referred to as 'the said Deposit') in respect of the said business at the said premises (the receipt of which the Lessor hereby acknowledges) which shall be refunded to the Lessee upon the completion of the said lease and upon all the terms and conditions hereinafter contained being fulfilled and/or observed.

D

(3) The Lessee hereby covenants with the Lessor as follows:

(a) to pay the said rental within the first week of each month without any deduction whatsoever, failing which, the Lessor will be at his absolute discretion to forfeit the said deposit and no action shall be brought by the Lessee in respect thereof and this agreement shall be null and void ipso facto.

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(b) to observe and comply with all laws, bylaws and regulations affecting the said business and premises which are now in force or which may hereinafter be enacted.

(c) to pay all charges in respect of water, electricity and conservancy in respect of premises No 150, Macalister Road, Penang only and deliver a copy of the receipts for the same to the Lessor.

F

(d) not to make or permit anyone to make any alteration in the construction or arrangement of the said premises without the consent of the lessor in writing.

(e) to permit the Lessor or his agents at all reasonable time during the term of the lease to enter upon and examine the condition of the said premises together with the fixtures and fittings thereto and thereupon the Lessor may serve upon the Lessee notice in writing specifying any repair necessary to be done and require the Lessee to forthwith execute the same and if the Lessee do not within ten (10) days after the receipt of such notice commence and proceed diligently with the execution of such repairs then to permit the Lessor to enter upon the said premises and execute such repairs and the costs thereof shall be a debt due from the Lessor and be forthwith recoverable by legal action.

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(f) to whitewash the said premises to the satisfaction of the relevant authorities once a year.

(g) all costs for repairs of the said premises amounting to or below Ringgit Malaysia One Thousand Five Hundred Only (RM1,500) shall be solely borne by the Lessee and if it is above RM1,500 then it shall be equally borne by the Lessor and the Lessee.

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(h) not to do or suffer to be done on the said premises anything whereby the licence of the said business may be rendered void or voidable.

(i) not to sell or allow to sell the same kind of food which is now carrying on at the said premises without the consent of the Lessor.

A

(j) not to assign, sublet or part with the said business and/or premises without the written consent of the Lessor.

(k) not to remove or sell any of the fixtures and fittings in the said premises.

(l) to be liable at all times for all fines, penalties and consequences in respect of any illegal acts done in the said premises and at all times during the continuance of the lease indemnify and keep indemnified the Lessor his personal representatives estate and effects against all liabilities which the Lessor may incur by reason of the Lessee's breach of any of the covenants herein contained.

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(m) to pay all lawyer's fees, legal costs, charges, disbursements and payments in connection with any claim or action against the Lessor arising from the acts or omission on the part of the Lessee of the covenants of this Agreement with the Lessor.

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(n) time shall be of essence of this Agreement whenever mentioned.

(o) at the determination of the said term to deliver up to the Lessor the said business and the said premises and all fixtures and additions thereto in such repair as shall in accordance with the covenants by the Lessee hereinbefore contained.

D

(4) The Lessor hereby covenants with the Lessee as follows:

(a) that the Lessee on paying the rent and on performing the Agreement therein contained may quietly possess and enjoy the said premises with the fixtures and fittings thereto and the said business during the term of the lease without any interference from the Lessor or those claiming under him.

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(b) in case of non payment of rent whether the same has been first demanded formally or not or breach of the Agreement by the Lessee the Lessor shall be at liberty to re-enter and take possession of the said premises and the business therein without prejudice to any other rights or remedies of the Lessor and thereupon this letting shall determine ipso facto and absolutely and the deposit paid under the Clause 2 hereof shall be forfeited.

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(5) In the event of the Lessee desiring or insisting to terminate this Agreement before the term of the said lease the said deposit of RM25,000 shall be forfeited to the Lessor as agreed liquidated damages but without prejudiced to the rights of the Lessor or to recover any arrears or rent then due or damage for any breach of the Lessee's covenants and stipulations.

G

(6) Notwithstanding anything herein contained it is expressly agreed that in the event of the said premises being destroyed or damage by fire by an Act of God at any time during the period of the said lease so as to become unfit for business and use then the deposit of RM25,000 paid under Clause 2 hereof shall be refunded to the Lessee and thereupon the said lease shall determine ipso facto and absolutely.

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(7) Any notice under this Agreement shall be deemed to be sufficiently served on the Lessee if left addressed to him on the said premises or sent by registered post or left at his last known address and in the case of the Lessor the same shall be deemed to be sufficiently served if sent to him by registered post or delivered personally to him at the address hereinbefore mentioned.

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(8) This Agreement shall bind the heirs personal representatives and assigns of the Lessor and Lessee respectively

(9) The Lessee shall have the option to renew the lease for another one (1) year term by paying the monthly rental of RM3,700 and upon expiry of the second lease term, the Lessee shall have another option to renew the lease for another one (1) year term by paying the monthly rental of RM3,800.

In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

[4] Later, the second defendant sublet the premises in question to his brother, the third defendant. We must mention at once that at the material time the premises in question were subject to the provisions of the Control of Rent Act 1966. In 1997 Parliament passed the Control of Rent (Repeal) Act 1997 which came into force on 1 September 1997. Section 3 of that Act provides as follows:

3. Upon the repeal of the Act under s 2, any tenancy between a landlord and a tenant before the date of the repeal shall forthwith be deemed to have ceased.

[5] Section 6(1) of the Act provided as follows:

6.(1) Notwithstanding s 3, any tenant, sub-tenant or joint-tenant who:

(a) was in actual occupation of the premises on the date of the repeal of the Act; and

(b) could have lawfully continued to occupy the premise but for the repeal of the Act,

shall be deemed to have entered into a tenancy with the landlord as from the date of the repeal of the Act.

[6] On 21 May 1998, the plaintiff took out a summons seeking the declarations averted to earlier in this judgment. These declarations are important to the plaintiff because if he is right then he would be the only person who will obtain the benefit of s 6(1) of the Act. If, of course, he was not the person in occupation then s 6(1) would not apply to him. That appears to be undisputed.

[7] The learned judge who heard the originating summons found for the plaintiff. He granted the declarations sought.

[8] The main issue both in the court below and before us is whether the second and third defendants were licensees of the plaintiff. The second defendant's case is that upon the proper construction of the agreement dated 1 November 1995 he is and was at all material times the plaintiff's sub-tenant and not a mere licensee. Mr Khoo for the plaintiff has argued that if one looks at the agreement and reads it in the light of the surrounding circumstances the true relationship between the parties is one of licensor and licensee and not one of landlord and tenant.

[9] It appears to be settled by the authorities that whether a particular relationship is that of licensee or tenant depends upon whether the person in occupation had exclusive possession of the subject property (see *Pong Khee Kwei v Tan Sai Kuy* [1972] 2 MLJ 48 where Sharma J discussed all the relevant authorities on point. In *Addiscombe Garden Estate Ltd v Crabbe* [1958] 1 QBD 513 at p 522 Jenkins LJ said this:

The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant,

A and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere a licence.

[10] *Street v Mountford* [1985] 2 All ER 289 and *Antoniades v Villiers* [1988] 3 All
B ER 1058 were cases where the landlord asserted that the persons there in occupation were licensees. The House of Lords in both cases held the occupiers to be tenants. Lord Templeman made it clear that it is effect of the particular agreement whether it creates a licence or a tenancy that is of paramount consideration for the court. The learned Law Lord said:

C In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr Street enjoyed freedom to offer Mrs Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased.
D Mrs Mountford enjoyed freedom to negotiate with Mr Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot
E alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for actual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

F **[11]** Let us now look at the document in this case. Without reproducing the essential clauses it is plain on reading of the agreement of 1 November 1995 as a whole that the second defendant had exclusive possession of the premises in question. For example, cl. 4 ensures quiet possession in the second defendant's favour. This points strongly to the relationship between the parties being one of landlord and
G tenant rather than licensor and licensee.

[12] In *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85, the facts of which case in our opinion are indistinguishable from the present one, Lord Brightman when delivering the advice of the Privy Council viewed the agreement in that case to be one that created the relationship of landlord and tenant rather than that of licensor and
H licensee. In particular, the Privy Council expressly upheld the following findings of the trial judge (at p 87):

I Even if the various clauses of the document were to be considered, it would be seen that the majority therein are covenants such as those for quiet enjoyment and reentry, which are normally found in standard tenancy agreements. In my opinion, therefore, the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of the landlord and a tenant and not that of a licensor and licensee.

[13] Lord Brightman then went on to say as follows (at p 88):

> The Federal Court considered that 'the dominant intention of the parties' was 'to give a licence to run the (defendant's) business of an eating shop as the (plaintiff's) own for the term with necessarily the use of the ground floor for this purpose. Clause 5 becomes decisive of the special relationship between the parties and the habendum must be seen to be an error of drafting.' In their Lordships' view it is the habendum and not clause 5 which is decisive. Except for clause 5, every recital and every clause of the July Document is either inconsistent with the grant of a licence or is neutral. Clause 5 is out of step with the rest of the document. It seeks to attach a label of 'licence' to a document which plainly is not a licence. It fails in that objective. The label does not attach.

[14] In *Goh Gok Hoon v Abdul Hamid & Anor* [1967] 1 MLJ 36, the plaintiff landlord, on facts not dissimilar from the present, asserted, as was done in the present instance, that the occupant in that case was only a lessee of the business and not of the premises. That contention was rejected by Ismail Khan J who, after setting out the agreement in that case, went on to say as follows (at p 40):

> In D2 the recital, referring to 'the restaurant business at No 2, Wolferstan Road', coupled the business together with the premises. Clause 6 then stipulated that 'the lessee shall not sublet the premises'; hence it raises the question, 'if he was not a subtenant, having an interest as such in the premises, why prohibit him from doing what was beyond his powers?' Clause 9 imposed on the lessee an obligation to pay the rent of the premises to the landlord, and clause 17 enabled the lessor 'to take possession of the premises' for non-payment of rent. This necessarily implied that the lessee was entitled to undisturbed possession of the premises, to the exclusion of the lessor, so long as rent continued to be paid. Exclusive possession, especially in the circumstances of this case, was not merely a hall-mark of a tenancy, but it was also in my opinion clear proof that the person having such possession was legally a tenant and not a licensee (see *Errington v Errington* [1952] 1 All ER 155; *Addiscombe Garden Estates Ltd v Crabbe* [1957] 3 All ER 563).

The judgment of Ismail Khan J (later CJ Borneo) was upheld by the Federal Court (see *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3).

[15] Applying the approach commended by the cases already cited, it is patently clear that the plaintiff in the present instance was not merely creating a licence in the second defendant's favour. Of course, the second defendant was permitted to run the coffee shop which was situated at the premises in question. But, for the reasons we have already given, what was being conveyed to the second defendant was exclusive possession of the premises in question.

[16] It is now necessary for us to deal with two other arguments advanced by Mr Khoo in answering to this appeal. First, he submits that the second defendant could not be more than a mere licensee because the sub tenancy, if any, in the second defendant's favour was created in breach of the covenant against subletting contained in the agreement between him and the first defendant's landlord. In support of this submission Mr Khoo relies on a passage in RR Sethu's *Rent Control Legislation In Malaysia*. That passage is at p 30 of the work. It reads:

> It appears that if the chief tenant was prohibited by the terms of the tenancy from subletting and if the landlord had not waived a breach thereof by the chief tenant, the latter cannot

sublet and if he purports to do so to another, the relationship thus created between the chief tenant and the other is that of a licensor and licensee only. This view follows from the decision of the Court of Appeal in *Great Eastern Life Assurance v Goh Ah Kow* [1981] 1 MLJ 127. The principle underlying this approach seems to be that a person cannot grant what he has not got (the nemo dat rule).

[17] The nemo dat rule was applied in effect in *Hock Yew Co v Fraser & Neave (M) Ltd & Ors* [1965] 2 MLJ 248.

[18] In *Hock Yew*, this is what Gill J said at (p 251):

> It follows from what I have said that the second defendants as mere licensees had no power to grant a subtenancy to the plaintiffs. Consequently the relationship between the second defendant and the plaintiffs was that of sub-licensor and sub-licensee.

[19] However, in *Methani v Perianayagam* [1961] MLJ 5, Wee Chong Jin J dealt with the same argument now raised before us. And this is what he said at (p 5):

> Counsel for the plaintiff contends that the relationship of landlord and tenant is purely an English common law notion and I entirely agree that this is so. It would therefore appear at first sight that the plaintiff, being only a licensee of the land on which these premises stand, had no estate or interest in the land out of which to carve a tenancy. Upon this principle of the common law has however been grafted an exception, namely, the doctrine of tenancy by estoppel. The doctrine is that a tenant may not question his landlord's title and, conversely, that a landlord having by his offer of a tenancy induced a tenant to enter into (or remain in) occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title to create it (see Harman J delivering the judgment of the Court of Appeal in *EH Lewis & Son Ltd v Morelli* [1948] 2 All ER 1023 at p 1024). In my view, where the facts justify the creation of a tenancy by estoppel it follows that the relationship of landlord and tenant is created between the parties to the estoppel. Support for this view may I think be found in the observations contained in the same judgment delivered by Harman J which I have just cited.

[20] In a later passage the learned Chief Justice of Singapore said this at (p 6):

> The other contention advanced on behalf of the plaintiff is that, assuming the defendant was not precluded from relying on the doctrine of tenancy by estoppel, he cannot be estopped from saying that he could not by law create a tenancy. I understand counsel's argument to be that the doctrine of tenancy by estoppel cannot apply to a case such as this where the grantor had himself no estate or interest in the land and so could not in law create a tenancy but in my opinion the short answer to it is that in such a case the doctrine does apply and that the law is that in such a case the grantor notwithstanding he had no estate or interest in the land is estopped by intendment of law from denying that he had created a tenancy.

[21] It is to be noted that the views of Wee Chong Jin J were not made available to nor discussed by Gill J in Hock Yew. If they had been, it is entirely unlikely, that Hock Yew would have been decided in the way it was. For ourselves, we respectfully prefer the judgment of Wee Chong Jin J in *Methani*, and for the reasons set out therein, we would reject, very respectfully the first submission advanced on the plaintiff's behalf.

[22] We turn now to the second submission. It is Mr Khoo's argument that his client should succeed against the third defendant because of the second defendant's breach of the covenant against subletting. The point made here is this. Since the second defendant had breached the covenant against subletting and put his brother, the third defendant in possession of the premises, the third defendant was a mere licensee. Mr. Lee, for the defendants, has however drawn our attention to the undisputed evidence in the appeal record which demonstrates two matters: First that the plaintiff had knowledge of the subletting; second that he had received rent from the third defendant.

[23] In *Yap Choo Neo (W) v Cheng Lan Lim* [1952] MLJ 160 a rest house had been let out. The tenant sub-let the premises. The landlord sought vacant possession against the subtenant which was a partnership. She failed. Knight J when delivering judgment said this at (p 161):

> The plaintiff normally garaged her car on the Resthouse premises, she is clearly a woman of intelligence and business acumen and quite apart from whether, on the principle of agency, she should be fixed with her son-in-law's knowledge, I have no doubt that she knew full well of the existence of the partnership and was quite happy to receive rent from it. It is not insignificant in this regard that as long ago as 12 August 1949 she seemingly instructed her then solicitors to inform 'The Manager' of the Resthouse as to a change in the method of paying rent (p 20 of exh I).
>
> I find, therefore, that the plaintiff both before and after 25 May 1950, the date of the current lease when these proceedings were instituted knew full well that the partnership was managing the Resthouse and that her son-in-law by written agreement of which she must have had knowledge was one of the partners. In these circumstances, and assuming that the partnership was in fact an unauthorized sub-tenant, thus breaching the defendant's covenant, the plaintiff clearly waived this breach by accepting rent from the partnership *Walrond v Hawkins* [1874] LR 10 CPC 342. On this finding it is unnecessary for me to consider whether in law the defendant did or did not sublet his tenancy to the partnership in breach of his covenant because if he did not there was certainly no breach.

[24] So too here. Since the plaintiff on the evidence, had knowledge of the third defendant's presence on the premises and of his occupation and received rentals from him, it now no longer lies in his mouth to assert a breach of the covenant against subletting.

[25] For the reasons already given, we are of the view that the appeal must succeed. It is allowed. The orders of the learned judge in the court below are set aside. The originating summons dated 21 May 1998 is hereby dismissed. The defendants will have their costs in this court and in the court below. The deposit lodged in court shall be refunded to the defendants.

Appeal allowed.

Reported by Sally Kee